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HOLDINGS INC. and GRUBHUB INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

15 ANDREW TAN and RAEF LAWSON in their  
16 capacities as Private Attorney General  
Representatives, and RAEF LAWSON,  
17 individually and on behalf of all other similarly  
situated individuals,

CASE NO. 3:15-cv-05128-JSC

**DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S MOTION FOR AN  
INDICATIVE RULING UNDER RULE 62.1**

## Hearing:

Date: October 11, 2018  
Time: 9:00 a.m.  
Place: Courtroom F—15th Floor  
Judge: Hon. Jacqueline Scott Corley

**Plaintiffs,**

V.

## GRUBHUB HOLDINGS INC. and GRUBHUB INC.,

### Defendants.

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## I. INTRODUCTION

Plaintiff Raef Lawson vigorously litigated his misclassification-based wage-and-hour claims against Defendants Grubhub Holdings Inc. and Grubhub Inc. (together, “Grubhub”) for three years and through a full trial on the merits. This Court found that Plaintiff was properly classified as an independent contractor and entered a verdict for Grubhub, which Plaintiff appealed. *See* Dkt. 221. Four months ago, Plaintiff asked the Ninth Circuit to remand his appeal so that this Court could consider whether the California Supreme Court’s recent decision in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 5th 903 (2018), affects the outcome of his case. *See* *Lawson v. Grubhub Inc.*, No. 18-15386 (9th Cir.), Dkt. 10. But the Ninth Circuit denied this request—indeed, it went one step further and pushed the appeal forward by setting an immediate briefing schedule. *Id.*, Dkt. 22.

Now, Plaintiff attempts an end run around the Ninth Circuit’s ruling and asks this Court for extraordinary relief—an advisory opinion while his appeal is pending—in the hope of achieving the precise remand expressly denied by the Ninth Circuit. This Court should decline to interject itself into the pending appeal, and opine on the very same issues that the Ninth Circuit is already poised to consider after thorough briefing and argument. Rather, the Court should reject Plaintiff’s attempt to thwart the just and speedy resolution of this case with unnecessary litigation.

A court may only relieve a party of a final judgment if “extraordinary circumstances” exist. Plaintiff comes nowhere close to making such a showing. The Ninth Circuit has invited Plaintiff to present his arguments regarding *Dynamex* in his merits briefing. And his appeal is proceeding quickly. The court set an August 20, 2018 deadline for Plaintiff’s Opening Brief—although Plaintiff has shown no urgency in prosecuting his appeal, having taken one 30-day extension and requested an additional extension until this motion has been heard. *See id.*, Dkt. 24, 25. The Ninth Circuit is fully capable of deciding what impact, if any, *Dynamex* has on this case. Indeed, this issue presents several dispositive questions of law that *must* ultimately be answered by the Ninth Circuit, including: Does *Dynamex* apply retroactively by its own terms? If so, does *Dynamex* apply outside the context of the IWC wage orders presented in that case? Even if *Dynamex* applies to some or all of Plaintiff’s claims by its own terms, would retroactive application in this case comport with federal due process under the facts presented here?

1        Rather than allow the Ninth Circuit to answer those questions, Plaintiff urges this Court to  
2 intervene and decide these important legal questions in the first instance. But regardless how this  
3 Court might decide these issues, the Ninth Circuit will have the final say on all questions of law.  
4 There is no reason to delay that decision any longer. Nor is there any reason to risk wasting  
5 significant time and judicial resources grappling with gateway issues before this Court when the  
6 Ninth Circuit could obviate the need for those proceedings if it concludes—as it should—that  
7 *Dynamex* cannot be applied retroactively in this case, or that it should not be applied to certain of  
8 Plaintiff’s claims in any event. If this Court were to agree with Grubhub that *Dynamex* does not  
9 apply, this Court’s verdict would stand and Plaintiff could take an immediate appeal, at which point  
10 he would be in the same position he is in now. And if this Court were to agree with Plaintiff and hold  
11 that *Dynamex* does apply, a retrial would be necessary, Plaintiff would get a second chance to  
12 prosecute claims that previously failed, and—at the end of the day—the parties would be right back  
13 where they are now, asking the Ninth Circuit to decide whether and how *Dynamex* applies.  
14 Plaintiff’s request to derail the normal appellate process should be summarily rejected.

15        Moreover, there is no merit to Plaintiff’s hypothetical Rule 60(b) motion. First, basic  
16 principles of fairness and due process preclude retroactive application of the new ABC test in a way  
17 that would nullify years of litigation and a full trial based on undisputed legal precedent dating back  
18 nearly 70 years, and potentially subject Grubhub to statutory penalties without fair notice of precisely  
19 what conduct could give rise to liability. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574  
20 (1996); *Moss v. Super. Ct.*, 17 Cal. 4th 396, 429 (1998). Neither the California Supreme Court nor  
21 the Ninth Circuit has ever before applied any test other than *Borello* to the classification question at  
22 issue in this case.

23        Second, even if *Dynamex* could be applied retroactively, it would not change the Court’s  
24 conclusion that Plaintiff was properly classified as an independent contractor. As an initial matter,  
25 the ABC test does not govern Plaintiff’s expense-reimbursement claim because *Dynamex*, by its own  
26 terms, applies only to claims brought under IWC wage orders. *See Cal. Trucking Ass’n v. Su*, \_\_\_  
27 F.3d \_\_\_, 2018 WL 4288953, \*3 n.4 (9th Cir. Sept. 10, 2018) (“*Dynamex* did not purport to replace  
28 the *Borello* standard in every instance where a worker must be classified as either an independent

1 contractor or an employee for purposes of enforcing California’s labor protections.”). In fact, the  
2 California Supreme Court expressly disclaimed any suggestion that *Dynamex* governs claims for  
3 expense reimbursement under California Labor Code section 2802. And assuming *arguendo* that the  
4 ABC test does apply to Plaintiff’s remaining claims for overtime and minimum-wage violations  
5 (it does not), due process entitles Grubhub to a new trial on those claims, Plaintiff still plainly  
6 qualifies as an independent contractor under that test, and Plaintiff failed to carry his burden to prove  
7 violations of overtime and minimum wage laws in any event. *See* Dkt. 216-1 at 98–109.

8 Finally, even if this Court were inclined to apply the ABC test to Plaintiff’s claims in the first  
9 instance, it may not relieve Plaintiff of the judgment it has already entered. The Court’s verdict is  
10 based on the *Borello* test, which was settled law at the time of trial, and reopening the case to  
11 determine whether that test still governs would serve only to undermine finality and cause delay,  
12 especially considering that the Ninth Circuit is both fully capable of resolving this question of law  
13 and *must* ultimately answer it.

14 Accordingly, this Court should follow the lead of the Ninth Circuit and deny Plaintiff’s  
15 motion for an indicative ruling. By doing so, the Court will promote the fair, speedy, and expeditious  
16 resolution of the issues presented in the forum that is ultimately responsible for answering them.

## 17 II. ARGUMENT

### 18 A. The Ninth Circuit should decide in the first instance whether *Dynamex* applies 19 retroactively.

20 The key question teed up by Plaintiff’s motion is whether *Dynamex* can be applied  
21 retroactively in this case. That legal question is already pending before the Ninth Circuit, which will  
22 have the ultimate say in any event because “whether [a court’s] holding should be applied  
23 retroactively” presents a pure “question[] of law.” *Austin v. City of Bisbee, Ariz.*, 855 F.2d 1429,  
24 1432 (9th Cir. 1988); *see also Beneli v. NLRB*, 873 F.3d 1094, 1098 (9th Cir. 2017) (“Whether new  
25 standards should be applied retroactively is a question of law, which we review de novo.”). Two  
26 months ago, Plaintiff asked the Ninth Circuit to remand that very issue to this Court. The Ninth  
27 Circuit declined and set an immediate briefing schedule for the appeal, precisely because when an  
28 appeal presents a pure question of law not passed upon by the district court, “the Court [of Appeal]

1 can and should resolve [it] without need for remand.” *Union Pac. R. Co. v. Bhd. of Locomotive*  
2 *Engineers & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 79 (2009); *see also*  
3 *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 522 (9th Cir. 1989) (there is “no need to remand” for  
4 decision of a “question of law”).

5 Undeterred, Plaintiff now tries his luck with a Rule 62.1 motion, soliciting this Court’s  
6 support for another bite at the remand apple. The Court should deny the motion. Permitting the  
7 Ninth Circuit to address what effect—if any—*Dynamex* has in this case would conserve judicial  
8 resources and facilitate the efficient resolution of this dispute. Considering that issue on remand  
9 would simply delay the inevitable because an appeal of this Court’s decision would surely follow no  
10 matter the outcome, leaving the parties exactly where they are now. Moreover, if this Court were to  
11 hold that *Dynamex* applies to any of Plaintiff’s claims, the parties would be compelled to relitigate  
12 Plaintiff’s claims under that standard before they could return to the Ninth Circuit. As explained  
13 below, relitigating any of Plaintiff’s claims under *Dynamex* would be no small feat: due process  
14 requires, at a minimum, a new trial on Plaintiff’s classification claim.<sup>1</sup> And if the Ninth Circuit came  
15 to a different conclusion, holding that *Dynamex* does not apply retroactively in this case, the  
16 significant expenditure of time and resources of the Court and the parties would have been for  
17 naught. Accordingly, the Court should summarily deny Plaintiff’s motion and allow the appeal to  
18 proceed as scheduled.

19 **B. Plaintiff’s motion does not satisfy the extraordinary requirements for reconsideration**  
20 **under Rule 60(b)(6).**

21 Plaintiff does not demonstrate the sort of “extraordinary circumstances” required for relief  
22 under Rule 60(b)(6). This Court is not asked simply to decide whether it would apply *Dynamex* in  
23 the first instance. Rather, it must determine whether it will *defer* considering Plaintiff’s motion, *deny*  
24 the motion, or “state either that it would grant *the [hypothetical] motion [for reconsideration under*  
25 *Rule 60(b)(6)]* if the court of appeals remands for that purpose or that the motion raises a substantial  
26 issue.” Fed. R. Civ. P. 62.1(a)(3) (emphasis added). That rule provides that “the court *may* relieve a

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27  
28 <sup>1</sup> Even if Plaintiff could be classified as an employee under *Dynamex* (he cannot), Plaintiff is not  
entitled to relief on his overtime, minimum wage, and expense reimbursement claims anyway,  
because he failed to prove those claims at trial. *See* Dkt. 261-1 at 98–115.

1 party or its legal representative from a final judgment, order, or proceeding for [reasons inapplicable  
2 here] . . . or (6) any other reason that justifies relief.” Fed. R. Civ. P. 60(b) (emphasis added). There  
3 is a high threshold for granting a motion for reconsideration under this rule; as one leading treatise  
4 observes, “[c]ourts have found few narrowly-defined situations that clearly present ‘other reasons  
5 justifying relief’” required by Rule 60(b)(6). Wright & Miller, *Federal Practice & Procedure* § 2864  
6 (3d ed. Sept. 2018). This makes eminent sense, as Rule 60(b)(6) “has been described as ‘an  
7 unprecedented addition to the Rules’” that “go[es] beyond the grounds for relief that would have been  
8 available under older procedures.” *Id.* Indeed, for this reason the Ninth Circuit emphasizes that “the  
9 exercise of a court’s ample equitable power under Rule 60(b)(6) to reconsider its judgment ‘requires  
10 a showing of extraordinary circumstances.’” *Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir.  
11 2009).

12 The facts here do not present such extraordinary circumstances. Although “*Dynamex*  
13 announced a substantive change in the law,” Dkt. 240 at 18, “it is clear that ‘a change in the law will  
14 not *always* provide the truly extraordinary circumstances necessary to reopen a case,’” *Jones v. Ryan*,  
15 733 F.3d 825, 839 (9th Cir. 2013) (quoting *Phelps*, 569 F.3d at 1133). Rather, the Court must  
16 consider six factors to determine whether a motion to reopen under Rule 60(b)(6) should be granted:  
17 (1) “the nature of the intervening change in the law”; (2) “the petitioner’s exercise of diligence in  
18 pursuing the issue”; (3) “the interest in finality”; (4) the “delay between the finality of the judgment  
19 and the motion for Rule 60(b)(6) relief”; (5) “the degree of connection between the intervening  
20 change of law and [the movant’s] case”; and (6) “comity.” *Lopez v. Ryan*, 678 F.3d 1131, 1135–37  
21 (9th Cir. 2012). These factors weigh decisively against reconsideration.

22 **First**, whatever change in law *Dynamex* effected “d[oes] not warrant reconsideration  
23 [because] the original decision ‘was by all appearances correct’ under then-prevailing legal  
24 precedent.” *Robertson v. Walker*, 2014 WL 4543068, at \*3 (quoting *Gonzalez v. Crosby*, 545 U.S.  
25 524, 536–37). *Borello* has governed misclassification claims like those asserted by Plaintiff for  
26 nearly three decades, and there is little dispute that the ABC test adopted in *Dynamex* is a marked  
27 departure from *Borello*. While Plaintiff relies heavily on a California superior court’s ruling on a  
28 motion in limine in *Johnson v. VCG-IS, LLC*, Case No. 30-2015-00802813 (Super. Ct. Cal. July 18,

1 2018), that decision acknowledged that “*Dynamex* established a *new standard* for evaluating  
2 independent contractor/employee issues (at least as to claims brought under the IWC wage orders).”  
3 *Id.* at 2 (emphasis added). And Plaintiff’s own motion concedes that “the California Supreme Court’s  
4 decision in *Dynamex* upends th[e] analysis” under *Borello*. Dkt. 240 at 4.

5 Plaintiff does not dispute that the ABC test is irreconcilable with *Borello*, but nevertheless  
6 insists that it was unclear at the time of trial whether *Borello* even applied to Plaintiff’s claims. In  
7 Plaintiff’s view, “[t]he California Supreme Court in *Martinez* had established that there were two  
8 other misclassification tests in addition to the *Borello* common law test,” and because “[t]he scope  
9 and meaning of” one of them “was itself unsettled,” *Dynamex* merely “adopted the ABC test to  
10 narrow and clarify” the law. Dkt. 240 at 19. But there was no indication that any of these  
11 “alternative” tests might apply to Plaintiff’s claims. On the contrary, *Martinez* emphasized the  
12 peculiar features of the IWC wage orders that supported application of a broader array of  
13 misclassification tests *in that context*. The court explained that “[w]hile the common law definition  
14 of employment plays an important role in the wage orders’ definition . . . , to apply only the common  
15 law definition while ignoring the rest of the IWC’s broad regulatory definition would substantially  
16 impair the commission’s authority and the effectiveness of its wage orders.” *Martinez v. Combs*, 49  
17 Cal. 4th 35, 65 (2010). In particular, “language consistently used by the IWC to define the  
18 employment relationship, beginning with its first wage order in 1916 (‘suffer, or permit’), was  
19 commonly understood to reach irregular working arrangements that fell outside the common law,  
20 having been drawn from statutes governing child labor and occasionally that of women,” and because  
21 the IWC was created “to regulate the employment of women and minors, to use this language to  
22 define the employment relationship was thus uniquely appropriate.” *Id.* Clearly, these considerations  
23 have no force outside IWC wage orders. And *Dynamex* confirmed that *Martinez* does not undermine  
24 *Borello*’s applicability to claims other than those under the IWC wage orders, emphasizing that it  
25 “express[ed] no view on th[e] question” whether the ABC test applies to claims “other than [those]  
26 encompassed by the wage order[s],” *Dynamex*, 4 Cal. 5th at 916 n.5; *see Cal. Trucking Ass’n v. Su*,  
27 2018 WL 4288953, \*3 n.4 (9th Cir. Sept. 10, 2018).

1           **Second**, the interests in finality, and against delay, counsel against reopening the case.  
2 Plaintiff argues that finality concerns are not implicated here because “even if the judgment in this  
3 case remains undisturbed, [Grubhub] will be unable to rely on it in light of *Dynamex*,” and in any  
4 event, there are no reliance interests “where an appeal or remand of the case is still pending.” Dkt.  
5 240 at 20. Similarly, he observes that “there has not been a significant delay between the finality of  
6 the judgment and [his] Motion for Rule 60(b)(6) relief.” *Id.* at 21. But this takes a far too narrow  
7 view of the finality and delay concerns. The parties have spent years litigating this case under  
8 *Borello*, including to a final verdict after trial. The question Plaintiff now raises—whether the ABC  
9 test applies to his claims after *Dynamex*—and the defenses presented by Grubhub—including  
10 whether federal due process would permit the retroactive application of the ABC test—are issues that  
11 the Ninth Circuit is fully competent to resolve in the first instance on the record already before it.  
12 Reopening this case would serve only to delay—potentially for years—the final resolution of this  
13 case. And it would cast unnecessary doubt on this Court’s verdict. For example, if the Court were to  
14 reopen the case and agree with Plaintiff that *Dynamex* applies to Plaintiff’s claims, vacating the trial  
15 verdict, the parties would be forced to retry Plaintiff’s claims to a final judgment before the Ninth  
16 Circuit has the opportunity to weigh in on the dispositive, antecedent question that is already before  
17 it. This is as unnecessary as it is inadvisable.

18           **Finally**, *Dynamex* is not “closely connected” with this Court’s verdict because it should not  
19 apply retroactively in this case and did not directly overrule *Borello* with respect to Plaintiff’s claims.  
20 Courts have found this factor satisfied where “the intervening change in the law *directly overruled*  
21 the decision for which reconsideration was sought.” *Phelps*, 569 F.3d at 1139 (emphasis added). But  
22 as explained above, neither *Martinez* nor *Dynamex* directly overruled *Borello* with respect to  
23 Plaintiff’s expense-reimbursement claim. *See Dynamex*, 4 Cal. 5th at 917 n.5 (“The drivers contend  
24 that the wage order definitions should apply to all the relief sought under section 2802 . . . . [T]hat  
25 issue is not before us and we express no view on that question.”); *see Cal. Trucking Ass’n v. Su*, \_\_\_\_  
26 F.3d \_\_\_, 2018 WL 4288953, \*3 n.4 (9th Cir. Sept. 10, 2018) (“*Dynamex* did not purport to replace  
27 the *Borello* standard in every instance where a worker must be classified as either an independent  
28 contractor or an employee for purposes of enforcing California’s labor protections.”). And Plaintiff

1 does not contend otherwise. On the contrary, Plaintiff asserts that *Dynamex* should be *extended* to  
2 this claim. *See* Dkt. 240 at 16 (admitting that “the *Dynamex* Court declined to address whether the  
3 ABC test would apply to an expense reimbursement claim brought pursuant to Cal. Lab. Code  
4 § 2802”). But this is precisely the type of situation that does *not* merit reopening the case. As the  
5 Ninth Circuit explained, “this factor is designed to recognize that the law is regularly evolving,” and  
6 “the mere fact that [it] do[es] so cannot upset all final judgments that have predated any specific  
7 change in law.” *Phelps*, 569 F.3d at 1139.

8 Nor is *Dynamex* closely connected to Plaintiff’s minimum-wage and overtime claims.  
9 *Dynamex* did not overrule *Borello* with respect to claims, like Plaintiff’s, that arose before *Dynamex*  
10 was decided. And in any event, Plaintiff’s minimum-wage and overtime claims fail irrespective of  
11 whether the *Borello* or the ABC test applies because Plaintiff failed to prove at trial that his Grubhub  
12 blocks constituted compensable on-call time—especially considering Plaintiff’s fraudulent practice of  
13 “perform[ing] little to no deliveries and yet get[ting] compensated as if he had been available for  
14 entire blocks.” Dkt. 221 at 22.

15 **C. Due process principles and Grubhub’s reasonable reliance on the *Borello* standard  
16 preclude retroactive application of *Dynamex* to this case.**

17 Basic principles of fairness and due process preclude retroactive application of the ABC test  
18 adopted in *Dynamex*—a tectonic shift in state law—to the independent contractor classification  
19 question *already decided at trial*. Indeed, retroactive application of the California Supreme Court’s  
20 ruling could potentially expose Grubhub to potentially massive liability even though it lacked fair  
21 notice that even proper classification of independent contractors under *Borello* is insufficient to  
22 exempt them from laws ordinarily applicable only to “employees.” Due process concerns are  
23 particularly acute in this case, where Grubhub successfully defended against Plaintiff’s claims at trial  
24 under a standard that *all parties and the Court* agreed applied to the claims at issue.

25 “Elementary notions of fairness enshrined in [the U.S. Supreme Court’s] constitutional  
26 jurisprudence dictate that a person receive fair notice” of both “the conduct that will subject him to  
27 punishment” and “the severity of the penalty that a State may impose.” *BMW of North America, Inc.*  
28 *v. Gore*, 517 U.S. 559, 574 (1996); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 266

1 (1994) (“The Due Process Clause also protects the interests in fair notice and repose that may be  
2 compromised by retroactive legislation”); *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal. 4th  
3 1159, 1171 (2005). Fair notice requires that a defendant be able to determine—in advance, and based  
4 on objectively identifiable standards—what conduct can give rise to liability. *See, e.g., Grayned v.*  
5 *City of Rockford*, 408 U.S. 104, 108 (1972) (explaining that “a basic principle of due process”  
6 requires “that laws give the person of ordinary intelligence a reasonable opportunity to know what is  
7 prohibited, so that he may act accordingly”); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1225  
8 (2018) (Gorsuch, J., concurring) (“Perhaps the most basic of due process’s customary protections is  
9 the demand of fair notice. . . . [That principle holds] true in civil cases affecting a person’s life,  
10 liberty, or property.”).

11 Consistent with these fundamental principles, the U.S. Supreme Court has held that, for  
12 example, where a defendant acts in reliance on agency guidance that is unclear about whether certain  
13 conduct can give rise to civil sanctions, due process forbids punishing a defendant for that conduct  
14 based on the agency’s later “interpretation” of the ambiguous guidance. *See, e.g., F.C.C. v. Fox*  
15 *Television Stations, Inc.*, 132 S.Ct. 2307, 2317–18 (2012); *Christopher v. SmithKline Beecham Corp.*,  
16 132 S.Ct. 2156, 2167 (2012) (refusing to defer to an agency’s “interpretation of ambiguous  
17 regulations to impose potentially massive liability . . . for conduct that occurred well before that  
18 interpretation was announced”).

19 California courts likewise decline to make new rules retroactive where doing so would violate  
20 the parties’ due process rights. The California Supreme Court has explained that “retroactive  
21 application of a decision disapproving prior authority on which a person may reasonably rely in  
22 determining what conduct will subject the person to penalties,” much “[l]ike retroactive application  
23 of an ‘unforeseeable and retroactive judicial expansion of’ a statute” “denies due process.” *Moss v.*  
24 *Super. Ct.*, 17 Cal. 4th 396, 429 (1998) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 352  
25 (1964)). Here, Plaintiff seeks civil penalties under California’s Private Attorneys General Act,  
26 Cal. Lab. Code § 2699 *et seq.*, for failure to reimburse business expenses and pay minimum wage and  
27 overtime compensation. Imposition of such penalties without fair notice of the conduct that may  
28

1 subject Grubhub to liability would be unconstitutional. *Christopher*, 132 S.Ct. at 2167; *Moss*, 17  
2 Cal. 4th at 429.

3 That rule applies not only to cases involving civil penalties, sanctions, or punitive damages,  
4 but—as Plaintiff acknowledges (Mot. at 12–13)—for *all types* of civil liability. Courts routinely  
5 “decline to follow [the] standard rule when retroactive application of a decision would raise  
6 substantial concerns about the effects of the new rule on the general administration of justice, or  
7 would unfairly undermine the reasonable reliance of parties on the previously existing state of the  
8 law.” *Sierra Club v. San Joaquin Local Agency Formation Com.*, 21 Cal. 4th 489, 508–09 (1999).  
9 For example, in *Olszewski v. Scripps Health*, 30 Cal. 4th 798, 829 (2003), the California Supreme  
10 Court invalidated two state statutes as preempted by federal law, but still concluded that they  
11 provided the defendant a safe harbor from a plaintiff’s claim for restitution under Business and  
12 Professions Code section 17200. *Id.* at 829. The court refused to apply its decision retroactively in  
13 *Olszewski* because the defendant reasonably relied on the statutes at issue, and thus subjecting the  
14 defendant to civil liability would have resulted in a due process violation. *Id.* at 829–30.

15 Plaintiff cites a California trial court ruling to suggest that that *Dynamex* should be applied  
16 retroactively in all cases. (Mot. at 11–12 (citing *Johnson v. VCG-IS, LLC*, Case No. 30-2015-  
17 00802813, Ruling on Motion in Limine (Super. Ct. Cal. July 18, 2018).) But that ruling—on a  
18 motion *in limine*, no less—carries no precedential weight. See *Anderson v. S.F. Rent Stabilization &*  
19 *Arb. Bd.*, 192 Cal. App. 3d 1336, 1356 (1987). *Johnson* also addressed *Dynamex*’s retroactivity only  
20 under California law and based on facts unique to that case—it did not purport to resolve any federal  
21 due process questions or address whether retroactivity would be appropriate in other cases,  
22 particularly where a party asserted a reliance interest and had already proceeded to trial under the  
23 then-controlling *Borello* standard. Plaintiff also notes that the California Supreme Court declined an  
24 invitation to modify *Dynamex* to clarify whether it should apply retroactively, but that ruling has no  
25 precedential effect, *see generally Kowis v. Howard*, 3 Cal. 4th 888, 896–97 (1992), and could just as  
26 easily indicate that the Supreme Court left that question to be answered on a case-by-case basis.

27 The potential imposition of liability on Grubhub under the California Supreme Court’s new  
28 formulation of the independent contractor classification test—one that was not found anywhere in the

1 Labor Code provision invoked by Plaintiff, in guidelines or handbooks promulgated by the California  
2 Division of Labor Standards Enforcement, or in any previously controlling case law—would violate  
3 Grubhub’s due process rights, particularly in light of prior California appellate decisions. Grubhub—  
4 like other California companies—could and reasonably did rely on longstanding rules for classifying  
5 independent contractors under California’s *Borello* test, which reflects principles dating back nearly  
6 70 years. *See, e.g., Tieberg v. Unemployment Ins. App. Bd.*, 2 Cal. 3d 943, 946-51 (1970); *Isenberg*  
7 *v. California Emp. Stab. Com.*, 30 Cal. 2d 34, 39 (1947) (applying “control test” elucidated in  
8 *Borello*). Moreover, California’s Labor & Workforce Development Agency for many years has  
9 received notices of claims asserted and lawsuits filed challenging independent contractor  
10 classification pursuant to the Private Attorneys General Act—including in this case—and has never  
11 intervened to assert that any test other than *Borello* should apply to the claims at issue.

12 Citing a single ruling from the California Labor Commissioner, Plaintiff argues that Grubhub  
13 could not rely on *Borello* in classifying drivers who contracted with Grubhub to perform food  
14 delivery orders as independent contractors. (Mot. at 15 (citing *Berwick v. Uber Techs., Inc.*, No. 11-  
15 46730 (Cal. Labor Comm. June 3, 2015).) Not so. The California Labor Commissioner came to the  
16 opposite conclusion in other cases. *See, e.g., Alatraqchi v. Uber Techs., Inc.*, No. 11-42020 CT (Cal.  
17 Labor Comm. Aug. 1, 2012) (concluding that a driver who uses the Uber application is independent  
18 contractor under *Borello* test). And this Court’s holding that Plaintiff properly was classified as an  
19 independent contractor is consistent with numerous other judicial decisions, arbitrations, and  
20 administrative orders that have found “gig economy” workers to be independent contractors rather  
21 than employees under *Borello* and similar tests. *See, e.g., Razak v. Uber Techs., Inc.*, 2018 WL  
22 1744467, at \*19 (E.D. Pa. Apr. 11, 2018) (“[G]iven the ‘totality of the circumstances,’” plaintiffs  
23 “have not brought to the record sufficient proof to meet their burden of showing that they are  
24 employees” under the Fair Labor Standards Act); *Uber Techs., Inc. v. Biafore*, Case No. BS172429  
25 (Cal. Super. Ct. July 2, 2018) (attached hereto as Exhibit A) (confirming arbitral award finding that  
26 “drivers had been properly classified as independent contractors”); *see also Vega v. Postmates Inc.*,  
27 78 N.Y.S.3d 810, 812 (N.Y. Sup. Ct. 2018) (“[Plaintiffs’] proof does not constitute substantial  
28

1 evidence of an employer-employee relationship to the extent that it fails to provide sufficient indicia  
2 of Postmates' control over the means by which these couriers perform their work.”).

3 Plaintiff also claims *Borello* was “but one way” to establish an employment relationship in  
4 California following *Martinez*. Not so. The test applied in *Martinez* was derived from the “IWC’s  
5 regulatory definitions” and applied only to claims brought under Labor Code section 1194. *Martinez*,  
6 49 Cal. 4th at 51–52, 68–77; *see supra* pp. 6–7. The *Martinez* test was not applied more broadly to  
7 other employment classification claims. Indeed, the California Supreme Court and the Ninth Circuit  
8 continued to apply *Borello* as the definitive framework for determining whether a worker is an  
9 independent contractor in numerous recent decisions. *See, e.g., Alexander v. FedEx Ground Package*  
10 *System, Inc.* (9th Cir. 2014) 765 F.3d 981, 988–97 (applying the “multi-factored test set forth in  
11 *Borello*” as the correct “test of an employment relationship” under California law); *Ruiz v. Affinity*  
12 *Logistics Corp.*, 754 F.3d 1093, 1100–05 (9th Cir. 2014) (“The California Supreme Court has  
13 explained that to determine whether a worker is an employee or independent contractor, a court  
14 should evaluate . . . a number of factors” set forth in *Borello*); *Ayala v. Antelope Valley Newspapers,*  
15 *Inc.*, 59 Cal. 4th 522, 530–31 (2014). If *Dynamex* had the sweeping retroactive application that  
16 Plaintiff proposes, countless cases would need to be retried. Moreover, the California Supreme Court  
17 and the Ninth Circuit have *never before held* that any alternative test applies outside of California  
18 Labor Code section 1194 claims. *See Cal. Trucking Ass’n v. Su*, \_\_\_\_ F.3d \_\_\_, 2018 WL 4288953,  
19 \*3 n.4 (9th Cir. Sept. 10, 2018) (“*Dynamex* did not purport to replace the *Borello* standard in every  
20 instance where a worker must be classified as either an independent contractor or an employee for  
21 purposes of enforcing California’s labor protections.”). Plaintiff himself conceded that California  
22 courts have “primarily focused” on *Borello* when addressing employment classification claims (*see*  
23 Dkt. 110 at 10), and applied *Borello* in key pretrial briefing and during his opening statement at trial.

24 Because Grubhub reasonably relied on *Borello* in classifying drivers as independent  
25 contractors and litigated this case for years—through an exhaustive trial, no less—under that agreed-  
26 upon standard, the Court should decline to apply *Dynamex* retroactively in this case. That result is all  
27 the more compelling given the impermissible due process implications of potentially subjecting  
28 Grubhub to statutory penalties and civil liability under a completely new classification standard.

1       **D.     *Dynamex* does not apply in any event to Plaintiff’s expense reimbursement claim.**

2              Even if *Dynamex* could be applied retroactively (it cannot), it does not apply to Plaintiff’s  
3 expense-reimbursement claims under California Labor Code section 2802. Indeed, *Dynamex* itself  
4 declined to extend the ABC test to such claims. In that case, the plaintiff “challenge[d] the Court of  
5 Appeal’s conclusion that the *Borello* standard is applicable to their cause of action under section 2802  
6 insofar as that claim seeks reimbursement for business expenses other than business expenses  
7 encompassed by the wage order.” *Dynamex*, 4 Cal. 5th at 916 n.5. But the Court “express[ed] no  
8 view on that question,” concluding that it had not been properly presented. *Id.*

9              Plaintiff asks the Court to nonetheless extend the ABC test’s application under California law  
10 for three reasons, none of which is persuasive. *First*, Plaintiff points to the California trial court’s  
11 *motion in limine* ruling in *Johnson*, Case No. 30-2015-00802813 (Super. Ct. Cal. July 18, 2018),  
12 which he claims “already rejected GrubHub’s argument in a context similar to this one.” Dkt. 240 at  
13 16. But *Johnson* has no precedential effect, *see Anderson*, 192 Cal. App. 3d at 1356, and addresses  
14 *none* of the federal due process and reliance issues presented here. *See supra* p. 10.

15              *Second*, Plaintiff asserts that “it would make little sense not to apply the same standard for  
16 employee classification to an expense reimbursement claim,” especially as “the suggestion that  
17 multiple tests should apply to state law wage and hour claims runs counter to the purpose of  
18 *Dynamex*—providing greater clarity and consistency in analyzing the issue of whether workers have  
19 been properly classified.” Dkt. 240 at 16 & n.9. But *Dynamex* rejected similar concerns “that a ‘two-  
20 test’ approach to the employee or independent contractor distinction would invariably lead to  
21 inconsistent determinations for disparate claims under different labor statutes brought by the same  
22 individual,” reasoning that “[a]ny potential inconsistency . . . arises from the IWC’s determination  
23 that it is appropriate to apply a distinct and particularly expansive definition of employment regarding  
24 obligations imposed by a wage order.” *Dynamex*, 4 Cal. 5th at 948; *accord Cal. Trucking Ass’n v.*  
25 *Su*, 2018 WL 4288953, \*3 n.4 (9th Cir. Sept. 10, 2018).

26              *Third*, Plaintiff argues that the same test must apply to section 2802 claims and claims under  
27 the IWC wage orders because ““where an individual is suing for violations of the minimum wage  
28 laws, etc., he or she is actually enforcing the Labor Code which, by its own terms, incorporates the

wage orders.”” Dkt. 240 at 17. But this contention also fails. As an initial matter, Plaintiff’s assertion that section 2802 merely incorporates the expense-reimbursement rights embodied in the wage orders is belied by his own admission that the two provisions cover different expenses. *See* Dkt. 240 at 17–18; *see also Dynamex*, 4 Cal. 5th at 916 n.5 (noting that the plaintiff in that case brought a section 2802 action “seek[ing] reimbursement for business expenses *other than business expenses encompassed by the wage order*”) (emphasis added). But even if it were not, a statute’s incorporation of substantive standards promulgated in a regulation (such as the governing minimum wage or the expenses for which a worker must be reimbursed) does not expand the *plaintiffs* who may assert a claim under that statute. This is particularly so with respect to wage-and-hour laws. Indeed, *Dynamex* based its adoption of the ABC test on the particular features of IWC wage orders, which “purposefully adopt[] [their] own definition of ‘employ’ . . . that is intentionally broader than the standard of employment that would otherwise apply.” *Dynamex*, 4 Cal. 5th at 947–48. And the departure from the *Borello* standard was only justified in *Dynamex* by “the history and purpose of the suffer or permit to work standard in California’s wage orders.” *Dynamex*, 4 Cal. 5th at 956–57. Section 2802, by contrast, does not adopt the broad definition of “employer” set out in the wage orders. *Compare* Cal. Code Regs., tit. 8, § 11090(2)(D), *with* Cal. Lab. Code § 2750.5. And generally speaking, where the legislature “has used the term ‘employee’ without defining it, [courts] have concluded that [it] intended to describe the conventional master-servant relationship as understood by common-law agency doctrine,” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992)—that is, the test articulated in *Borello*.<sup>2</sup>

**E. Applying *Dynamex* would not change the outcome of the Court’s classification ruling.**

Even if *Dynamex* could be applied retroactively, it would not change the Court’s conclusion that Plaintiff is an independent contractor, not Grubhub’s employee. Under the “ABC test” adopted by the California Supreme Court in *Dynamex*, “a worker is properly considered an independent

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<sup>2</sup> The superior court in *Johnson* suggested that section 2802 must sweep as broadly as the wage order because “there is no private right of action under the wage orders.” But there is nothing unusual about a regulation that applies to a broad set of actors and which may be enforced generally by a governmental agency (the IWC wage orders), but which confers a private right of action on only a subset of the regulated class (section 2802).

1 contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the  
2 worker is free from the control and direction of the hirer in connection with the performance of the  
3 work, both under the contract for the performance of such work and in fact; (B) that the worker  
4 performs work that is outside the usual course of the hiring entity’s business; and (C) that the worker  
5 is customarily engaged in an independently established trade, occupation, or business of the same  
6 nature as the work performed for the hiring entity.” *Dynamex*, 4 Cal. 5th at 916–17. All three prongs  
7 of the ABC test support Plaintiff’s classification as an independent contractor.<sup>3</sup>

8       **1.     Grubhub did not control or direct Plaintiff’s performance.**

9 Plaintiff’s argument that he is an employee under prong A of the ABC test is unavailing. This  
10 prong looks to whether “the worker is free from the control and direction of the hiring entity in  
11 connection with the performance of the work, both under the contract for the performance of the  
12 work and in fact,” *Dynamex*, 4 Cal. 4th at 957, and closely tracks the control test under *Borello*.  
13 Indeed, the California Supreme Court emphasized in *Dynamex* that “because a worker who is subject  
14 . . . to the type and degree of control a business typically exercises over employees would be  
15 considered an employee under the common law test, such a worker would, *a fortiori*, also be properly  
16 treated as an employee for purposes of the suffer or permit to work standard.” *Id.* at 958. And for  
17 that reason, “[t]he hiring entity must establish that the worker is free of such control to satisfy part A  
18 of the test.” *Id.*

19 Plaintiff disputes the relevance of *Borello*’s control analysis to this prong of the ABC test,  
20 noting that “in construing prong A, the *Dynamex* Court favorably cited a case in which the Vermont  
21 Supreme Court . . . found that a clothing company retained the right to control the work of its knitters  
22 and sewers even though they ‘worked at home on their own machines at their own pace and on the  
23 days and times of their own choosing.’” Dkt. 240 at 10 (citing *Dynamex*, 4 Cal. 4th at 958 n.27). But

24  
25 \_\_\_\_\_  
26       <sup>3</sup> If the Court concludes that *Dynamex* should be applied to the classification question presented in  
27 this case, Grubhub reserves its right to present evidence at a new trial. As Plaintiff himself  
28 emphasizes (Mot. at 3–5), the ABC test turns on unique factual questions that were not the  
subject of the original trial under the *Borello* standard. As other courts have recognized, the ABC  
test often turns on “disputed issues of material fact” that preclude resolution of the classification  
question on summary judgment. *Chebotnikov v. LimoLink, Inc.*, 2017 WL 2888713, at \*8  
(D. Mass. July 6, 2017).

1 that case is unhelpful to Plaintiff for two reasons. First, the Vermont Supreme Court’s opinion noted  
2 that its interpretation of prong A departed from that of the Massachusetts Supreme Judicial Court.  
3 *See Fleece on Earth v. Dept’s of Emp. & Training*, 181 Vt. 458, 464 (2007) (“To support its position  
4 that the control test in part A is essentially the common law master-servant test, FOE cites *Athol*  
5 *Daily News v. Board of Review of Division of Employment & Training*, 439 Mass. 171 (2003) . . . .  
6 We reached the opposition conclusion in *Times-Argus Ass’n v. Department of Employment &*  
7 *Training*, 146 Vt. 320 (1985).”). As the California Supreme Court has emphasized, although “[t]he  
8 wording of the ABC test varies in some respects from jurisdiction to jurisdiction,” “[t]he version we  
9 have set forth in text . . . tracks the Massachusetts version of the ABC test.” *Dynamex*, 4 Cal. 5th at  
10 956 n.23. Second, that case simply concluded that a worker’s flexibility over when and where to  
11 work is not *dispositive* of control: “To reduce part A of the ABC test to a matter of what time of day  
12 and in whose chair the knitter sits when the product is produced ignores the protective purpose of the  
13 unemployment compensation law.” *Fleece on Earth*, 181 Vt. at 600. Ultimately, the court in that  
14 case found prong A satisfied because the putative employer exercised substantial control over the  
15 means of performing the work, regardless of where and when the work was performed. *See id.*  
16 (“That the product is knit, not crocheted, and how it is to be knit, is dictated by the pattern provided  
17 by FOE.”). That is not the case here.

18 As this Court has already held, Plaintiff exercised nearly complete freedom from control  
19 while using the Grubhub app. Of course, Plaintiff “controlled whether and when [he] worked and for  
20 how long.” Dkt. 221 at 20. He “could decide not to work a block he signed up for right up to the  
21 time the block started,” and even then “had no obligation to perform any delivery offered to him by  
22 Grubhub even though he had signed up to work a particular block.” *Id.* But that is not all. “Grubhub  
23 did not control how he made the deliveries—whether by car, motorcycle, scooter or bicycle.” *Id.* at  
24 19. It “never inspected or even saw a photograph of Mr. Lawson’s vehicle” and “did not control Mr.  
25 Lawson’s appearance while he was making Grubhub deliveries.” *Id.* Additionally, “Grubhub did not  
26 require Mr. Lawson to undergo any particular training or orientation,” “[h]e was not told what  
27 supplies, if any, he had to have with him,” and “Grubhub did not control who could be with Mr.  
28 Lawson in his vehicle, or even accompany him into a restaurant to pick up an order or to a customer’s

1 door to make a delivery.” *Id.* at 19–20. Indeed, “[n]o one at Grubhub was Mr. Lawson’s boss or  
2 supervisor,” and Grubhub “did not prepare performance evaluations of Mr. Lawson.” *Id.* at 22. This  
3 ultimately cost Grubhub: “For weeks, if not months, Mr. Lawson was able to perform little to no  
4 deliveries and yet get compensated as if he ha[d] been available for entire blocks.” *Id.* And as this  
5 Court rightly noted, “Mr. Lawson’s gaming of the Grubhub driver app further illustrates how little  
6 control Grubhub had over the details of Mr. Lawson’s work.” *Id.*

7 Contrary to Plaintiff’s assertion, *see* Dkt 240 at 10, Grubhub’s purported right to terminate at  
8 will does not change this outcome. Notably, Plaintiff does not, and cannot, allege that he was  
9 *actually* terminated at will—as this Court found, “Mr. Lawson’s dishonesty eventually led to  
10 Grubhub’s termination of his Agreement *for cause*.” Dkt. 221 at 22 (emphasis added). And while  
11 prong A turns on the worker’s freedom from control “both under the contract for the performance of  
12 the work and in fact,” *Dynamex*, 4 Cal. 5th at 964, this Court has also rejected Plaintiff’s claim that  
13 the contract’s termination provisions favor employee status. *See* Dkt. 221 at 25 (“Grubhub’s right to  
14 terminate at will is neutral in the right to control analysis.”). Even if it did not, the right to terminate  
15 at will does not erase the many considerations showing that “the right to control factor weighs  
16 strongly in favor of finding that Mr. Lawson is an independent contractor.” *Id.*

17 **2. Plaintiff’s work was not part of Grubhub’s usual course of business.**

18 Plaintiff’s argument that he is an employee under prong B of the ABC test is similarly  
19 unavailing. Prong B of the ABC test asks whether “the worker performs work that is outside the  
20 usual course of the hiring entity’s business.” *Dynamex*, 4 Cal. 5th at 955–56. The key inquiry is  
21 whether a worker is “reasonably viewed as providing services to the business in a role comparable to  
22 that of an employee, rather than in a role comparable to that of a traditional independent contractor.”  
23 *Id.* at 959. “[A] purported employer’s own definition of its business is indicative of the usual course  
24 of that business. Another factor is ‘whether the service the individual is performing is necessary to  
25 the business of the employing unit or merely incidental.’” *Sebago v. Boston Cab Dispatch, Inc.*, 471  
26 Mass. 321, 333 (2015) (citations omitted).

27 Plaintiff claims this Court already made findings that conclusively resolve this inquiry.  
28 (Mot. at 6.) He is mistaken. While the Court addressed whether Plaintiff’s work was simply “*part of*

1 Grubhub’s regular business” as one of more than a dozen *Borello* factors, *Lawson*, 302 F. Supp. 3d at  
2 1090 (emphasis added), the prong B inquiry focuses on whether Plaintiff’s work was “**necessary to**”  
3 Grubhub’s *raison d’être* as a technology company that facilitates and operates an online take-out  
4 marketplace. *Sebago*, 471 Mass. at 334–36. Simply put, it was not. And if the Court were to  
5 consider the merits of this issue on remand, Grubhub has a due process right to present evidence on  
6 this issue in a new trial in light of the different standard, including new evidence regarding the  
7 sources of Grubhub’s revenue, the relative significance of each revenue source—facilitating delivery  
8 orders, in particular—to Grubhub’s total revenue, and the nature of Grubhub’s business model.

9       The Supreme Judicial Court of Massachusetts’ ruling in *Sebago* underscores why Plaintiff  
10 was properly classified as an independent contractor. There, licensed taxicab drivers who leased  
11 taxicabs and medallions alleged that defendants—taxicab owners, radio dispatch associations, and a  
12 garage service—had improperly classified them as independent contractors. The court disagreed,  
13 holding that defendants satisfied all three prongs of the independent contractor test as a matter of law.  
14 *Id.* at 329–337. As to prong B, the court explained that although some owners describe themselves as  
15 “taxicab services,” they do not actually provide or “hold themselves out as providing transportation  
16 services to passengers.” *Id.* at 335. Nor does it matter that drivers “incidentally contribute to the  
17 owners’ advertising revenues,” because the owners “are not directly dependent on the success of the  
18 drivers” and do not depend on drivers’ “fares and tips” as a primary source of revenue. *Id.* at 334.  
19 Similarly, although the radio dispatch associations actually “advertise themselves as providing  
20 taxicab services and . . . arrange for the transportation of passengers,” the “realities of [their] actual  
21 business operations” demonstrate that the “radio associations’ business is not directly dependent on  
22 the drivers’ services,” because their “*raison d’être* is to provide dispatch services to medallion  
23 owners—a service that is funded by medallion owners and only incidentally dependent on drivers.”  
24 *Id.* at 335. Nor did it matter that dispatch services profited by “creat[ing] a base of customers  
25 (passengers)” for drivers, because that benefit is “incidental to the ordinary course of the radio  
26 associations’ business of selling dispatch services to medallion owners.” *Id.* at 336. As the court  
27 emphasized, “[o]ne may be engaged in a business that cannot be conducted unless he . . . can  
28 [deliver] the finished product to [customers]. It is hard to imagine a business that is not dependent in

1 some way upon transportation. In such instances, ***while transportation is a necessity, it does not***  
2 ***thereby become a part of or a process in the business*** but it continues as ancillary and incidental  
3 thereto.” *Id.* (quoting *Cannon v. Crowley*, 318 Mass. 373, 376 (1945)) (emphasis added); *accord*  
4 *Sagar v. Fiorenza*, 2014 WL 794966, at \*6 n.11 (Mass. Super. Ct. Jan. 18, 2014) (rejecting claim that  
5 prong B is satisfied simply because “without the services of [drivers], [a dispatch] business would  
6 cease to operate,” because “that outcome would be an indirect consequence of the cessation of  
7 [drivers’] services, rather than a direct one”).

8 Here, as in *Sebago* and *Sagar*, Plaintiff’s work was not part of Grubhub’s “usual course of  
9 business” simply because Plaintiff provided transportation services as an incidental part of Grubhub’s  
10 operation. First, as the Court already recognized in its post-trial opinion, Grubhub holds itself out as  
11 “an internet restaurant ordering platform that connects diners with participating restaurants.”  
12 *Lawson*, 302 F. Supp. 3d at 1090. Plaintiff emphasizes the Court’s finding that facilitation of  
13 “delivery services” was “part of” Grubhub’s business under the *Borello* test, and that Grubhub  
14 “developed an entire mobile app and algorithm and created entire company departments to facilitate  
15 Grubhub’s delivery services.” (Mot. at 6 (citing *Lawson*, 302 F. Supp. 3d at 1091).) But that is  
16 equally true of the radio dispatch associations in *Sebago*, which marketed taxicab services, arranged  
17 for the transportation of passengers by the plaintiff-drivers, and profited from those services. *Sebago*,  
18 471 Mass. at 335. Nonetheless, Grubhub—like the radio associations in *Sebago*—is not, and never  
19 has been, “directly dependent” on delivery as a primary source of revenue. *Id.* at 334–36. The  
20 “realities” of Grubhub’s “actual business operations” demonstrate that Grubhub’s “*raison d’être*” as  
21 an online take-out marketplace is to market restaurants to a broad audience of diners while offering  
22 diners a singular destination to browse for dining options. *Id.* Grubhub did not even offer to  
23 facilitate food delivery during its first 10 years of operations. *Lawson*, 302 F. Supp. 3d at 1090. And  
24 although Grubhub—like all of the defendants in *Sebago*—profited incidentally from delivery orders  
25 that it facilitated, those delivery orders were *less* lucrative than self-delivery or customer pickup  
26 orders, and incidental delivery revenue constituted a small percentage of Grubhub’s total revenue  
27 during the relevant time frame. Nor does it matter that at the time Plaintiff contracted to perform  
28 deliveries, “more diners had Grubhub deliver their food than picked it up themselves.” *Lawson*, 302

1 F. Supp. 3d at 1090. That simply animates the unremarkable fact that most businesses are  
2 “dependent in some way upon transportation,” which “does not thereby become a part of or a process  
3 in the business but it continues as ancillary and incidental thereto.” *Sebago*, 471 Mass. at 336; *Sagar*,  
4 2014 WL 794966, at \*6 n.11. In short, Grubhub-facilitated deliveries are simply *incidental* to  
5 Grubhub’s “usual course” of business as a technology company that operates an online marketplace.

6 **3. Plaintiff was engaged in an independent trade, occupation, or business.**

7 Prong C of the ABC test asks whether “the worker is customarily engaged in an  
8 independently established trade, occupation, or business of the same nature as the work performed.”  
9 *Dynamex*, 4 Cal. 5th at 955–56. “The critical inquiry under this prong is whether ‘the worker is  
10 capable of performing the service to anyone wishing to avail themselves of the services or,  
11 conversely, whether the nature of the business compels the worker to depend on a single employer for  
12 the continuation of the services.’” *Sebago*, 471 Mass. at 336–37 (quoting *Athol Daily News v. Bd. of*  
13 *Review of Div. of Emp’t & Training*, 439 Mass. 171, 181 (2003)). Where a worker “ha[s] the right to  
14 offer his services to ‘anyone wishing to s[o] avail themselves,’” he will qualify as an independent  
15 contractor. *Sagar*, 2014 WL 794966, at \*8.

16 There can be no dispute here that Plaintiff was capable of performing food delivery using  
17 other clients’ platforms. Indeed, this Court has already found that Plaintiff did precisely that: “[O]n  
18 many occasions [Plaintiff] made deliveries for Grubhub’s restaurant delivery competitors while  
19 working a Grubhub scheduled block.” Dkt. 221 at 21. Similarly, Plaintiff “had the right to reject any  
20 order offered during his scheduled block,” *id.* at 20—another indicium of work in an independently  
21 established trade, occupation, or business. *See Kubinec v. Top Cab Dispatch, Inc.*, 2014 WL  
22 3817016, at \*13 (Mass. Super. Ct. June 25, 2014) (concluding that plaintiff taxi driver is not an  
23 employee under prong C where “[h]e can take advantage of referrals that Top Cap sends him or reject  
24 them if he thinks he can earn more picking up other fares that he finds himself”).

25 Plaintiff ignores the substantial case law explaining prong C of the ABC test, instead focusing  
26 solely on the Court’s conclusion that Plaintiff was not “engaged in a distinct occupation or business”  
27 *under the Borello test*. *See* Dkt. 240 at 8–9. And Plaintiff offers no explanation for his assumption  
28 that *Dynamex* incorporates this prong—but *only* this prong—of the test that it otherwise displaced.

1 The most Plaintiff can muster is *Dynamex*'s language indicating that "[a]s a matter of common usage,  
2 the term 'independent contractor,' when applied to an individual worker, ordinarily has been  
3 understood to refer to an individual who *independently* has made the decision to go into business for  
4 himself or herself." Dkt. 240 at 9 (quoting *Dynamex*, 4 Cal. 5th at 962). But this language hardly  
5 incorporates *Borello*'s "distinct occupation or business" prong. On the contrary, *Dynamex* expressly  
6 cited *Boston Bicycle Couriers, Inc. v. Deputy Direct of Division of Employment & Training*, 56 Mass.  
7 App. Ct. 473 (2002), in its discussion of prong C. *Dynamex*, 4 Cal. 5th at 963 n.31. As that case  
8 explained, the factors

9 tending to show a proprietary interest in an independently established trade or business  
10 include, but are not limited to, that: (1) the individual worker is free both to operate an  
11 independent enterprise and to perform services without hindrance from the employing  
12 unit; (2) the independent enterprise was created and exists separate and apart from the  
13 worker's relationship with the particular employing unit; (3) the worker's independent  
enterprise is not interconnected with, and is not dependent in any way upon, engagement  
by the particular employing unit, or other companies engaged in the subject industry;  
and (4) the worker's independent enterprise would survive as an ongoing business  
entity, notwithstanding the termination of the relationship with the employing unit.

14 *Boston Bicycle Couriers*, 56 Mass. App. Ct. at 480–81. The Massachusetts Supreme Judicial Court  
15 likewise relied on *Boston Bicycle Couriers* in determining that a worker qualifies as an independent  
16 contractor under this prong where he "is capable of performing the service to anyone wishing to avail  
17 themselves of the services." *Athol Daily News*, 439 Mass. at 181.

18 Because Plaintiff was capable of performing food delivery using other clients' platforms—  
19 and in fact did so—he is not an employee under prong C of the ABC test. Even if there were some  
20 room for doubt on this question (there is not), the differences between this prong of the ABC test and  
21 the "distinct business" prong of the *Borello* test require that Grubhub receive the opportunity to  
22 present evidence showing that Plaintiff was engaged in an independent trade, occupation, or business.  
23 See *supra* at pp. 4, 15 n.3.

24 **F. Plaintiff's claims fail on the merits because of his fraudulent conduct.**

25 Even if Plaintiff could establish that the ABC test applies (he cannot), and that he is an  
26 employee under that test (he is not, *see supra*, § E), he still cannot prove his wage-and-hour claims  
27 for reasons unique to each of those claims. Specifically, Plaintiff did not meet his burden of proving  
28 that his self-selected Grubhub blocks constituted compensable on-call time for purposes of

1 California's overtime and minimum-wage laws. Among other reasons, Plaintiff routinely toggled  
2 onto the Grubhub platform several hours after the start of his blocks, performed deliveries for other  
3 companies during his blocks, and even remained at home during those blocks. *See* Dkt. 216-1 at 107.  
4 In fact, he actively defrauded Grubhub by manipulating the block system, toggling himself  
5 "unavailable" and in airplane mode for significant portions of his blocks to ensure that he did not  
6 receive any delivery offers from Grubhub—all the while collecting payment from Grubhub for the  
7 entirety of his blocks. *See id.* Because Plaintiff did not, and could not, prove that his blocks  
8 constituted compensable on-call time, his minimum-wage and overtime claims necessarily fail.

9 Plaintiff's expense-reimbursement claim fares no better. Because Grubhub reasonably and in  
10 good faith classified Plaintiff as an independent contractor under the *Borello* test—which governed  
11 his classification during the entire time he used the Grubhub app—Grubhub had no reason to know  
12 that Plaintiff incurred mileage-related expenses for which he was entitled to reimbursement. And in  
13 any event, Grubhub *did* pay Plaintiff for mileage. Plaintiff did not produce any evidence that he  
14 incurred mileage-related expenses in excess of the payments he received from Grubhub. Nor could  
15 he, because he did not even maintain such records. In short, Plaintiff did not—and cannot—carry his  
16 burden to prove any of his claims.

### 17 III. CONCLUSION

18 The Court should not indulge Plaintiff's request to derail the normal appellate process and  
19 litigate in this Court the very legal questions now pending before the Ninth Circuit. Doing so simply  
20 risks wasting time and judicial resources answering gateway questions that must be resolved, one  
21 way or another, by the Ninth Circuit. Even if the Court were inclined to consider Plaintiff's motion,  
22 Grubhub respectfully submits that *Dynamex* cannot be applied retroactively to the classification  
23 question already resolved at trial under the *Borello* standard. And regardless of whether *Dynamex*  
24 applied, it should not change the Court's conclusion that Plaintiff was an independent contractor, not  
25 Grubhub's employee. Accordingly, the Court should deny or defer ruling on Plaintiff's motion for an  
26 indicative ruling.

1 Dated: September 17, 2018

GIBSON, DUNN & CRUTCHER LLP

3 By: /s/ *Theane Evangelis*  
4 Theane Evangelis

5 Attorneys for Defendants GRUBHUB HOLDINGS  
6 INC. and GRUBHUB INC.

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## **ECF ATTESTATION**

I, Brandon J. Stoker, hereby attest that concurrence in the filing of this document has been obtained from Theane Evangelis.

Dated: September 17, 2018

By: /s/ Brandon J. Stoker  
Brandon J. Stoker

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this document was served by electronic filing on September 17, 2018, on all counsel of record.

Dated: September 17, 2018

By: \_\_\_\_\_ /s/ *Brandon J. Stoker*  
Brandon J. Stoker